FILED
NOV 12 1998
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 98-606

In The

Supreme Court of the United States

October Term, 1998

CHARLES B. TAYLOR,

Petitioner,

vs.

ANNE ROONEY, in her capacity as Acting Principal, South Middle School,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

RESPONDENT'S BRIEF IN OPPOSITION

ROBERT J. CIOVACCO
Counsel of Record
CERTILMAN BALIN ADLER & HYMAN, LLP
Attorneys for Respondent
90 Merrick Avenue
East Meadow, New York 11554
(516) 296-7000

Of Counsel:

JEANNINE A. BROOMHALL
NEIL H. ANGEL

149535

Counsel Press LLC
FORMERLY LUTZ APPELLATE SERVICES
(800) 274-3321 • (800) 359-6859

23pp

RESPONDENT'S COUNTER STATEMENT OF QUESTION PRESENTED

1. Whether the Court of Appeals for the Second Circuit correctly applied principles of proximate causation to the facts of this case in holding that the school district's investigation into the petitioner's (Taylor) altercation with a student, the decision of the Board of Education to prefer charges against Taylor, the decision of the disciplinary hearing panel that Taylor had used excessive force and that he should be suspended for one year without pay and the Commissioner of Education's rejection of Taylor's appeal from the panel's decisions were sufficiently independent of defendant Rooney's initial reporting of this incident to constitute intervening causes, breaking any possible causal connection between the principal's reports and Taylor's suspension.

TABLE OF CONTENTS

	Page
Respondent's Counter Statement of Question Presented	i
Table of Contents	ii
Table of Cited Authorities	iii
Additional Regulations Involved	1
Statement of the Case	3
Reasons for Denying the Writ	11
I. The Court Of Appeals Correctly Applied Principles Of Proximate Causation To The Facts Of This Case, Including The Doctrines Of Superseding And Intervening Causes.	11
A. The Second Circuit's Decision does not Conflict with any Rulings of this Court.	11
B. The Second Circuit did not Misapply this Court's Prior Rulings on Causation.	15
C. The Second Circuit Correctly Applied its Prior Decision in *Jeffries v. Harleston*, and the Decision does not Conflict with *City of Springfield, Massachusetts v. Kibbe*.	16
D. The Second Circuit Correctly Applied the Standard for Review of the Denial of a Motion for Judgment as a Matter of Law.	17
Conclusion	19

TABLE OF CITED AUTOHORITIES

Page

Cases:

Arnold v. International Business Machines Corporation, 637 F.2d 1350 (9th Cir. 1981) 14, 15

Barts v. Joyner, 865 F.2d 1187 (11th Cir. 1989) 16

City of Springfield, Massachusetts v. Kibbe, 480 U.S. 257, 107 S. Ct. 1114 (1987) 16, 17

Exxon Company U.S.A. v. Sofec, Inc., 517 U.S. 830, 116 S. Ct. 1813 (1996) 12

Guitierrez-Rodriguez v. Cartagena, 882 F.2d 553 (1st Cir. 1989) 18

Jeffries v. Harleston, 52 F.3d 9 (2d Cir. 1995) 11, 16

Malley v. Briggs, 475 U.S. 333, 106 S. Ct. 1092 (1986) 11, 12, 15

Martinez v. California, 444 U.S. 277, 100 S. Ct. 553 (1980) 15, 18

Monroe v. Pape, 365 U.S. 167, 1887 S. Ct. 373 (1961) 12, 15

Samuels v. Air Trans. Local 504, 992 F.2d 12 (2d Cir. 1993) 17

Simblest v. Maynard, 427 F.2d 1 (2d Cir. 1970) 17

Table of Cited Authorities

Page

Sir Speedy, Inc. v. L&P Graphics, Inc., 957 F.2d 1033 (2d Cir. 1992) 17

Springer v. Seamen, 821 F.2d 871 (1st Cir. 1987) 12, 13, 14, 16, 18

Warner v. Orange County Dept. of Probation, 115 F.3d 1068, 1071 (2d Cir. 1996) 16, 18

Statute:

42 U.S.C. § 1983 17

United States Constitution:

First Amendment 10

Fourth Amendment 12

Rules:

8 NYCRR § 19.5 1

8 NYCRR § 100.2 2

8 NYCRR § 100.2(l)(3)(ii) 12

Federal Rules of Civil Procedure, Rule 12(b)(6) 9

Respondent, Anne Rooney, respectfully requests that Taylor's Petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Second Circuit be denied.

ADDITIONAL REGULATIONS INVOLVED

8 NYCRR § 19.5 Prohibition of corporal punishment.

(a) No teacher, administrator, officer, employee or agent of a school district in this State, or of a board of cooperative educational services in this State, shall use corporal punishment against a pupil.

(b) As used in this section, *corporal punishment* means any act of physical force upon a pupil for the purpose of punishing that pupil, except as otherwise provided in subdivision (c) of this section.

(c) In situations in which alternative procedures and methods not involving the use of physical force cannot reasonably be employed, nothing contained in this section shall be construed to prohibit the use of reasonable physical force for the following purposes:

(1) to protect oneself from physical injury;

(2) to protect another pupil or teacher or any person from physical injury;

(3) to protect the property of the school or others; or

(4) to restrain or remove a pupil whose behavior is interfering with the orderly exercise and performance of school district functions, powers

and duties, if that pupil has refused to comply with a request to refrain from further disruptive acts.

8 NYCRR § 100.2 General School Requirements

(l) School Conduct and Discipline

(3) Corporal punishment. (i) The term *corporal punishment*, as used in this section, shall mean any act of physical force upon a pupil for the purpose of punishing that pupil. Such term, as used in this section, shall not mean the use of reasonable physical force for any of the following purposes:

(a) to protect oneself from physical injury;

(b) to protect another pupil or teacher or any other person from physical injury;

(c) to protect the property of the school or of others; or

(d) to restrain or remove a pupil whose behavior is interfering with the orderly exercise and performance of school district functions, powers or duties, if that pupil has refused to comply with a request to refrain from further disruptive acts;

provided that alternative procedures and methods not involving the use of physical force cannot reasonably be employed to achieve the purposes set forth in clauses (a) through (d) of this subparagraph.

(ii) In every school district and supervisory district, the trustee, trustees, board of education or board of cooperative educational services, shall submit a written semiannual report to the Commissioner of Education, by January 15th and July 15th of each year, commencing July 1, 1985, setting forth the substance of each complaint about the use of corporal punishment received by the local school authorities during the reporting period, the results of each investigation, and the action, if any, taken by the school authorities in each case.

STATEMENT OF THE CASE

Taylor's employment with the Brentwood School District began in 1970, long before Rooney became principal. Since that time, Taylor had been involved in not less than thirteen documented incidents concerning complaints made against him of physical and verbal abuse of students at South Junior High School ("South"), aged 12 to 16. In almost every instance, Taylor would submit rebuttal letters, acknowledging the incidents but claiming that the student's and/or parent's version was incorrect and/or claiming that his use of force was justified. These incidents were well-documented and more than just the accusations of a "disgruntled parent or a disruptive student." (E 4,51,53-55,72-79,189,191-94,196-98, T 88,116, 270,712-13,843-45,1148-50,1336,1430-36,1457-58,1974-75.)[1]

In addition to denying responsibility for the incidents, it was Taylor's practice to accuse anyone that disagreed with him of racism. For example, in 1976 he filed a complaint with the New York State Division of Human Rights charging the school

1. "A" designations refer to the Joint Appendix Volume below, "E" designations to the Exhibits Volume and "T" designations to the Trial Transcript.

district, the Superintendent of Schools, the Administrative Assistant, the Principal (not Rooney), the Assistant Principal and Director of Athletics with racial discrimination. (E 5.) The complaint was dismissed as meritless. (T 1191.) In this action, Taylor had accused virtually the entire Brentwood School District Board of Education, its supervisory staff and even the disciplinary hearing panel members of racism. (A 15-25.)

The two incidents for which Taylor was ultimately charged were as follows: In 1989, Taylor was accused of putting a student, Rudy P., in a headlock, which caused injury to Rudy's arm and neck. After this incident, Rooney became concerned about the large number of complaints by students and parents of incidents of verbal abuse and physical force involving Taylor. After discussing her concerns with Michael Welch, then Director of Elementary Education and former principal of South, and Michael Fasullo, then Director of Employee Relations and Planning, (T 539-40), Rooney sent Taylor a memorandum on May 23, 1989, about the Rudy matter. In the memorandum, she referenced a history of the complaints against Taylor, including those which arose while Welch was principal, and indicated that any further incidents involving Taylor's use of force against a student would be suspect. (E 226-29.)

By said memo, Rooney was attempting to get Taylor's attention by putting before him his history of complaints of improper conduct toward students, in the hope that he would realize there was a serious problem and that he would get some help. (T 1462-63.) Taylor submitted a rebuttal letter to the memo that included suggestions of racism. (E 84-91.)

Since 1985, the New York State Commissioner of Education has required that school districts submit semiannual reports of any complaints of corporal punishment. (E 174-88.) The reports require information concerning the investigation

undertaken in response to the complaint, and the action taken, if any, by the school authorities. Building principals are responsible for providing such information to Central Administration. Fasullo was responsible for collecting the information, preparing the semiannual reports and transmitting the reports to the Commissioner. (T 423,1812-13.)

Procedurally, while an incident can be resolved at the building level, the ultimate determination of whether the matter has been so resolved or whether it requires further investigation rests with Central Administration. (T 1885-90,1959.) Such was the case in an incident involving an Industrial Arts teacher and a student, James W. Fasullo personally discussed the incident with the principal of East Junior High School, despite the apparent resolution of the matter at the building level and the detailed report submitted to Fasullo by the principal describing the incident, his investigation and the results. (E 234-5.)

Frank Mauro, then Superintendent of Schools, and Les Black, then Associate Superintendent, both testified that even if a parent does not want the matter pursued, Central Administration has the responsibility to make its own determination. (T 607, 1959.) The Rudy incident was of the type required to be included in the reports.

Subsequent to Rooney's memorandum to Taylor, a meeting was held in January 1989 with Black, Welch, Fasullo, Taylor and his attorney, where Taylor was given the opportunity to present his version of the events involving Rudy. A second purpose of the meeting was to let Taylor know that the Rudy matter was serious enough to result in charges against him and was not just a building level matter. (T 1943,1979-87, E 231-33.) Several areas of concern were pointed out to Taylor, one of which was the recurrent allegations of verbal abuse and use of physical force on students. Another was that Taylor's feelings

of racial persecution had been asserted during two prior administrations. (E 231.)

On December 5, 1991, Taylor, had an altercation with a student, Alex A. It was alleged that Taylor, a martial arts expert, flipped the student and then grabbed him by the throat to get him back on his feet. After the altercation with Taylor, there were visible bruises and red welts on the student's neck. When Rooney saw this, she asked the Assistant Principal, Ithiel Lloyd, to take pictures of the student's neck using the Polaroid camera that is kept in the office for reporting incidents of suspected child abuse. (T 1472-74,1479.)[2]

Contrary to Taylor's attempt to infer that Lloyd had never photographed a student before, (Petition, p. 4) Lloyd's actual testimony was that it was the first time he had taken pictures "of a student with a complaint like this." (T 1722.) Additionally, Taylor's allegations concerning Rooney's duties and responsibilities, and the "facts" allegedly underlying the extent of Rooney's involvement in the charges brought against Taylor, (Petition, pages 4-6) are not supported by the record, nor are Taylor's conclusions and opinions.

After Rooney learned of the incident, she went to Taylor's classroom and told him about the welts on Alex's neck and what Alex had said. (T 1475-76.) Initially, Taylor did not say he had been attacked, but when he met with Rooney later in the day and Alex repeated his story, Taylor then said Alex had taken a swing at him and that they ended up on the floor. (T 1477-1480.) Taylor further claimed that the welts were caused by the student's cousin, who tried to separate Taylor and Alex.

---

2. On Page 4 of his Petition, Taylor avers that he "gently flipped Alex to the floor." After four years of litigation, this is the first time that Taylor has admitted to flipping this student. At his 3020-a hearing, Taylor specifically denied flipping Alex, gently or otherwise. (E 167.)

(E 97-98.) Taylor also said that he had a statement from a student who witnessed the incident, Michael N. Although Rooney took Taylor's report, she initially refused to take Michael's statement because it appeared to have been edited and she told Taylor that she wanted to make her own investigation. (T 1481-82,1640-43.) Although not initially admitted into evidence, when Taylor testified that Michael's statement said that he and Alex were both on the floor, the statement was used to impeach him on cross-examination because there was nothing in the statement about Taylor being on the floor at all. (T 1357.)

When Rooney reported the incident to Fasullo, as she was required to do with all complaints of physical force as discussed above, Mauro ordered an independent investigation. This investigation was conducted by Fasullo. (T 499,574,1427-28,1852-53.)

Fasullo outlined the investigation he undertook, at which time he had Taylor's statement and the photographs. Initially he met with Taylor, Taylor's union representative, Malossi and the union president, Hogan. (T 1853.) Fasullo then spoke to a number of students who were witnesses to the incident and that had been recommended either by Taylor or Taylor's union representative, including Michael N. This last student later testified at the 3020-a hearing that Taylor flipped Alex. (E 167.) Fasullo did not accept Taylor's version of the incident. (T 1853-56, E 236-39.)

Fasullo's report following his investigation stated that the evidence indicated there was reasonable cause to conclude that Taylor's actions "can easily be categorized as corporal punishment and not self defense." One of the key issues was the cause of the severe bruises on each side of Alex's neck. Fasullo's report recommended that, in light of Taylor's history

and the Commissioner's Regulations, charges under the Education Law be preferred against Taylor. It was Fasullo's opinion that Taylor had precipitated the incident with Alex by his actions toward the student at the outset, and that the marks on the student's neck clearly indicate a degree of force far beyond that which would be required under the circumstances. (E 236-39.)

Although Rooney had reported the incident to Fasullo and Welch, was interviewed as part of Fasullo's investigation and provided the photographic evidence of the welts on the student's neck, she was not present during Fasullo's interview with the students who had witnessed the incident, she was not consulted during or after the investigation, nor did she participate in the decision to prefer charges against Taylor. (T 1483-85,1852-53.)

At the December 1991 meeting of the Board of Education, Black informed the Board about the incident and presented a detailed background relating to all of the prior incidents involving Taylor, including those under two prior principals. (T 1950-55.)

On December 11, 1991, Taylor was suspended with pay. (E 36) The Board ultimately decided to prefer charges against Taylor on both the Rudy and Alex incidents. The earlier incident was included because of the large number of prior complaints of excessive force involving Taylor, which indicated a pattern of inappropriate conduct toward students and documented the fact that Taylor had been given prior warnings. (T 417,485-87,497, 1950-55.)

Hearings were held on the school district's charges in 1992. At the hearings, Taylor was represented by counsel, testified and called witnesses on his behalf and cross-examined the

school district's witnesses. (E 154-165.) After the proceedings were closed, the hearing panel dismissed the charges pertaining to Rudy but sustained the charge on the Alex incident and the charge of insubordination because he had been given prior warnings. (E 165.) The panel specifically found that Taylor had used excessive force in disciplining this student, resulting in bruises on Alex' neck. (E 166.)

As part of the 3020-a hearing, Taylor claimed that he had been treated differently than another teacher, J. Basso, who also had been involved in an incident with the same student the month before Taylor's altercation. In addressing Taylor's claim, the panel explicitly found that:

> A better example of the proper use of force was that described by Teacher Basso, witness for Respondent, who testified that he wrapped Student Alexis in a bear hug and carried him to the office when faced with unruliness.

(E 167.)

Taylor appealed the panel's decision to the Commissioner of Education, who dismissed the appeal. (E 170-173.) In said appeal, Taylor again claimed that there were discrepancies in the school district's treatment of him as compared to Mr. Basso. The Commissioner's opinion noted that the hearing panel did address this issue, but found significant differences between Taylor's and Basso's use of force, as noted above. (E 172.)

After the filing of plaintiff's civil rights complaint, the school district moved pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure to dismiss the complaint, *inter alia*, on grounds of collateral estoppel. (A 26-28.) The school district argued that the factual issues of Taylor's use of excessive force

against Alex, Taylor's insubordination for failing to heed prior warnings and that Taylor was not treated any differently than other teachers had all been decided against Taylor by the hearing panel. Contemporaneously, the hearing panel member defendants cross-moved on immunity grounds. The district court judge granted the hearing panel members' motion but denied the school district's motion, holding that "the constitutional violations were never raised in the hearing panel proceedings." (A 48.)

At trial, both the 3020-a Panel's decision and the Commissioner's affirmance were admitted into evidence. However, the trial judge charged the jury that the decisions were not determinative of the issues in the case and that Taylor could refute every allegation ever made against him, including Alex's. (T 203-14,207,2336.)

At the close of Taylor's case-in-chief, the defendants moved to dismiss both the First Amendment and equal protection claims. The motion on the First Amendment issue was granted and decision on the equal protection claim was reserved, although the judge opined that Taylor's record, as compared to the other teachers that Taylor claimed to be "similarly situated" was entirely different and that he did not consider them similar. (T 1408-10.) At the close of the evidence, the judge still reserved decision on the equal protection claim, although he again expressed doubts about whether Taylor's long history, compared to the other teachers, made those teachers similarly situated. (T 2139.)

The jury returned a verdict in favor of all defendants, with the sole exception of Rooney. (A 59-68.) The equal protection issue was renewed with the trial judge, as was Rooney's duty to report the precipitating incident and the issue of proximate cause, all as part of Rooney's motion for judgment as a matter

of law. (T 2419-28.) The judge denied Rooney's motion and entered judgment for Taylor. (A 173.)

Rooney appealed the district court's judgment to the Court of Appeals for the Second Circuit. The Second Circuit reversed the judgment, holding that their prior decision in *Jeffries v. Harleston,* 52 F.3d 9 (2d Cir. 1995) controlled the outcome of this case and that the intervening acts of the independent investigations and findings of Fasullo and other school district officials, the decision of the Board to prefer charges, the decisions of the disciplinary hearing panel that Taylor be suspended and the Commissioner of Education's rejection of Taylor's appeal broke any causal connection between Rooney's reports of Taylor's inappropriate conduct toward the students and Taylor's suspension.

Following the decision, Taylor moved for rehearing with a suggestion for rehearing *en banc* and later moved to recall the Court of Appeals' mandate. Both motions were denied.

Taylor's petition for certiorari to this Court ensued.

REASONS FOR DENYING THE WRIT

I.

THE COURT OF APPEALS CORRECTLY APPLIED PRINCIPLES OF PROXIMATE CAUSATION TO THE FACTS OF THIS CASE, INCLUDING THE DOCTRINES OF SUPERSEDING AND INTERVENING CAUSES.

A. The Second Circuit's Decision does not Conflict with any Rulings of this Court.

Taylor claims that the Second Circuit's decision below conflicts with the decisions of this Court in *Malley v. Briggs,*

475 U.S. 333, 344 n.7, 106 S. Ct. 1092, 1098 n.7 (1986) and *Monroe v. Pape*, 365 U.S. 167, 1887 S. Ct. 373, 384 (1961). However, both *Malley* and *Monroe* are Fourth Amendment cases and Taylor's Petition merely invokes dicta from these cases for the general propositions that "principles of causation borrowed from tort law are relevant in civil rights actions brought under Section 1983" and that "tort defendants, including those sued under § 1983 are responsible for the natural consequences of their actions." Petition, p. 8.

Rooney does not dispute these elementary propositions, but respectfully reminds the Court that "principles of causation" include intervening and superseding acts, which, as recognized by this Court, will relieve a tort defendant of liability, even for admittedly wrongful conduct. *See Exxon Company U.S.A. v. Sofec, Inc.*, 517 U.S. 830, 837, 116 S. Ct. 1813, 1818 (1996) ("Superseding cause operates to cut off the liability of an admittedly negligent defendant.")

At the outset, it must be recognized that, in a superseding cause analysis, the tort defendant's initial alleged act must have been *wrongful*. In the case at bar, not only was Rooney's initial act of reporting Taylor's altercation with Alex not wrongful, i.e., the incident indisputably occurred and the student was actually injured, but her report was *mandated* pursuant to the Commissioner of Education's requirements, 8 NYCRR § 100.2(l)(3)(ii). This puts the situation in the case at bar on an entirely different footing than the state trooper in *Malley*, where the trooper *interpreted* words that he overheard in a wiretapped conversation as referring to marijuana usage. 475 U.S. at 337-38.

Taylor's Petition, then, does not rely on any precedent of this Court, but instead primarily relies on the First Circuit case of *Springer v. Seamen*, 821 F.2d 871 (1st Cir. 1987). Not only

is this an improper basis for petitioning this Court, but the legal and factual differences between *Springer* and the case at bar make the two cases as different as night and day, and thereby cause no conflict between the decisions in *Springer* and the case at bar. Procedurally, *Springer* was decided after the granting of the defendants' motion for summary judgment by the district court. In reversing the district court, the First Circuit found there were material issues of fact as to whether the Postal Service's investigation and termination decision were sufficiently independent of the defendants' discriminatory actions to constitute superseding causes. *Id.* at 879.

Moreover, the factual differences between the two cases in all respects are far greater. For example, the plaintiff in *Springer* "had a *perfect work record*, and the people on his route regarded him highly" and "*No one on his mail route had ever made any complaint through his long term of carrier service.*" *Id.* at 873 (emphasis added). Contrast this with Taylor's long history of at least thirteen documented incidents of physical and verbal abuse of students and the numerous complaints by parents that he was treating their children improperly.

Of even greater dissimilarity is the evidence of racial animus in the two cases. In *Springer*, the evidence that the defendants were racially biased against the plaintiff consisted of loathsome racist remarks and threats. *Id.* at 873-74. Compare the remarks in *Springer* to the innocuous comments attributable to Rooney by Elizabeth Phipps, a probationary teacher who was denied tenure, as reported in the Second Circuit's opinion. *See* Petition, App. A, p. 14a, n.6.

The paramount difference between the two cases, however, is the degree of involvement the respective defendants had during the subsequent investigation. For example, in *Springer*,

it was the defendants' actions that resulted in an allegedly coerced confession from Mr. Springer and there were also allegations that the defendants deliberately mishandled the letters that were sent to test Mr. Springer's honesty. It was these fraudulent acts that led the First Circuit to conclude that there were, at least, issues of fact as to the independent nature of the investigation. 821 F.2d at 879.

In light of the foregoing, it is inconceivable that Taylor can claim that: "the fact pattern in *Springer* is very similar to the fact pattern in the instant case." Petition, p. 9. There was not a shred of evidence that Rooney improperly influenced Fasullo's investigation in any manner.

Taylor's statement on page 5 of his Petition that, "Rooney also determined which students Fascullo, [sic] from the Superintendent's office would interview and she prepared those students for their meeting with Fasullo," is blatantly false. A review of the cited pages from the trial transcript reveals no such testimony. Rather, the pages reference Rooney's refusal to accept a statement from one student, Michael N., because it appeared to have been edited. (T 1640-42.) Fasullo testified that the students he interviewed were recommended either by Taylor or his union representative, not Rooney, and Fasullo's report indicates that Taylor explicitly recommended one student, Michael N. (E 236, T 1853.)

The facts of this case are closer to those in *Arnold v. International Business Machines Corporation*, 637 F.2d 1350 (9th Cir. 1981), cited in the *Springer* opinion. In *Arnold*, the plaintiff was arrested, searched and indicted for the theft of trade secrets, conspiracy and receiving stolen property. The arrest was a result of a Task Force organized by the state Attorney General, the district attorney and police to investigate the theft of IBM's proprietary information and trade secrets

over several years. After the criminal prosecution was terminated following the suppression of documentary evidence, Mr. Arnold sued his former employer for conspiring with state officials to violate his civil rights. IBM moved for and was granted summary judgment. The district court judge ruled that IBM was not the legal cause of Arnold's arrest, search and indictment.

In affirming the dismissal, the Ninth Circuit held that mere participation in the investigation of a civil rights plaintiff is not enough to impose liability, despite IBM's involvement in the Task Force's investigation having been far greater than Rooney's involvement in Fasullo's investigation in the case at bar. Compare, 637 F.2d at 1357 with the facts in the case at bar. The Ninth Circuit explicitly rejected a "cause in fact" argument and held that IBM's *lack of control* of the investigation relieved it of any liability on proximate cause grounds. 637 F.2d at 1357. The record is clear that Rooney had no involvement in Fasullo's independent investigation, that she exercised no control over the investigation and that she took no part in the decision to prefer charges against Taylor. Taylor can point to no evidence that contradicts or taints the independent nature of Fasullo's investigation and the Second Circuit's decision was correct.

B. The Second Circuit did not Misapply this Court's Prior Rulings on Causation.

As stated in the previous section, the decision of the Second Circuit did not misapply any of this Court's prior rulings on causation from either the cited *Malley* or *Monroe* opinions, *supra*. Although Taylor makes no additional references to which decisions of this Court he is referring to in this section of his Petition, he seems to suggest that the Second Circuit improperly relied on *Martinez v. California*, 444 U.S. 277, 100 S. Ct. 553 (1980), a foreseeability case.

Just as mere participation is not enough to impose civil rights liability, as in *Springer, supra*, neither is mere foreseeability, as in *Warner v. Orange County Dept. of Probation*, 115 F.3d 1068, 1071 (2d Cir. 1996), in cases where a defendant relies on an independent investigation into the subject matter of the plaintiff's complaint as a superseding cause, unless there is also evidence that a defendant falsified information or otherwise improperly influenced the investigation, as in *Springer*. *See also Barts v. Joyner*, 865 F.2d 1187, 1195 (11th Cir. 1989) (intervening acts of prosecutor, grand jury, judge and jury held to break the chain of causation unless plaintiff can show that these acts were the result of deception or undue pressure by the defendant policemen). Not only was there no evidence that Rooney either controlled or improperly influenced the investigation, but the jury explicitly found that the other defendants did not violate Taylor's rights. (A 60-61.)

C. The Second Circuit Correctly Applied its Prior Decision in *Jeffries v. Harleston*, and the Decision does not Conflict with *City of Springfield, Massachusetts v. Kibbe.*

This section of Taylor's Petition, suggesting that the Second Circuit misapplied its own decision in *Jeffries v. Harleston*, 53 F.3d 9 (2d Cir. 1995), is the height of presumption. It is also not a recognized basis for this Court to grant a Petition for Certiorari. In any event, it must be noted that, just as in *Jeffries*, there was no evidence that anything Rooney did improperly influenced Fasullo's investigation.

Taylor is being especially disingenuous when he states that: "There was no conclusive proof that the Superintendent of Schools, the Board of Education and the Disciplinary Panel were not influenced by the actions of Rooney." Petition, p. 14.

Aside from the inherent difficulty of proving a negative, Taylor forgets that, as plaintiff, *he* had the burden of proving that Rooney's actions tainted the investigation.

Rooney testified that she did not request that charges be brought against Taylor either for the Rudy P. or the Alex A. incidents and that she was not consulted about the bringing of these charges. (T 1485.) If Taylor was in possession of any information to refute this testimony, it was incumbent on him to produce it. In the absence of such evidence, there could be no basis for which a reasonable jury might conclude that Rooney improperly influenced the investigation or the subsequent intervening acts.

The Second Circuit's decision is also not in conflict with this Court's opinion in *City of Springfield, Massachusetts v. Kibbe*, 480 U.S. 257, 107 S. Ct. 1114 (1987) (per curiam). It is difficult to understand how *Kibbe*, a decision to dismiss a writ that had been improvidently granted in an action to decide if ordinary negligence would suffice to establish municipal liability under § 1983 for inadequate training of city employees, is in any way relevant to the issues in this case.

D. The Second Circuit Correctly Applied the Standard for Review of the Denial of a Motion for Judgment as a Matter of Law.

Again, Taylor presumptively argues that the Second Circuit improperly relied on its own precedent, *Samuels v. Air Trans. Local* 504, 992 F.2d 12 (2d Cir. 1993); *Sir Speedy, Inc. v. L&P Graphics, Inc.*, 957 F.2d 1033, 1039 (2d Cir. 1992) and *Simblest v. Maynard*, 427 F.2d 1, 4 (2d Cir. 1970), by placing "undue emphasis on the sufficiency element of the evidence." Petition, p. 17. A review of the Second Circuit's decision, however, reveals no such analysis of the sufficiency of the evidence.

Quite the opposite, the Second Circuit both correctly stated the applicable standard for review of the denial of a motion for JMOL, as well as concluding that: "Because no reasonable factfinder could conclude that Rooney was the cause of any constitutional harm or injury to Taylor, Taylor cannot prevail in this § 1983 action." Petition, App. A, pp. 15a, 22a.

It is within this standard that the Second Circuit rendered its opinion. There was absolutely no evidence adduced at trial that would allow a reasonable juror to conclude that Rooney either controlled or improperly influenced the school district's investigation into the Alex A. altercation, the subsequent decision to prefer charges against Taylor, the hearing panel's determinations or the Commissioner of Education's affirmance. Therefore, none of Taylor's cited authorities, *Martinez, Warner, Springer, supra,* or *Guitierrez-Rodriguez v. Cartagena*, 882 F.2d 553 (1st Cir. 1989), diminish the Second Circuit's ruling in this action. Taylor's Petition for a Writ of Certiorari presents no issues for this Court to consider, other than Taylor's disagreement with the Court of Appeals' disposition of an individual case and must be dismissed.

CONCLUSION

This case presents no questions of constitutional import in terms of causation principles applicable in section 1983 cases, as well as the standard of review of the denial of a motion for JMOL. The decision of the court below does not conflict with any decisions of this Court, nor is there any conflict with the cases cited from the First, Ninth, Eleventh or D.C. Circuits that the other Circuits would have reached a different result than the Second Circuit did in the case at bar.

Accordingly, Rooney respectfully requests that Taylor's Petition be denied.

Respectfully submitted,

ROBERT J. CIOVACCO
Counsel of Record
CERTILMAN BALIN ADLER
& HYMAN, LLP
Attorneys for Respondent
90 Merrick Avenue
East Meadow, New York 11554
(516) 296-7000

Of Counsel:

ROBERT J. CIOVACCO
JEANNINE A. BROOMHALL
NEIL H. ANGEL